

March 2017

Trust in water

Ms [REDACTED] and Severn Trent Water

Final decision of an appeal under section 105B of the Water Industry Act 1991

Appeal against Severn Trent Water's proposal to adopt a private sewer

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1. Introduction

- 1.1 This is the final decision of an appeal referred by Ms A [REDACTED] (**“the Appellant”**) of [REDACTED], Derbyshire, [REDACTED] (**“the Property”**) to the Water Services Regulation Authority (**“Ofwat”**) on 19 September 2011 for a determination under section 105B of the Water Industry Act 1991 (**“the Act”**) against a proposal by Severn Trent Water (**“Severn Trent”**) to adopt a private sewer on the Property.
- 1.2 This appeal is on the grounds that the adoption would result in serious detriment to the Appellant. This is for the Appellant to demonstrate.
- 1.3 This final decision precedes a draft decision which we issued on 17 September 2013 to both parties and invited them to make representations to us.

2. Factual background

A. The parties

The Appellant

2.1 The Appellant owns the Property and the private sewer.

Severn Trent

2.2 Severn Trent is a water and sewerage undertaker appointed under the Act to provide water and sewerage services to customers in the Midlands and mid Wales. It owns the public sewers in the area of the Property.

B. The site

2.3 The map attached at [Appendix 1](#) (“**the Plan**”) shows the approximate location of 23 houses, one of which is the Property. It also shows, at the time when the Appellant submitted her appeal, the approximate location of the private sewer up to the point where it communicates with the public sewer.

2.4 The pipework shown on the Plan includes the private sewer that is the subject of this appeal (in light blue) which runs at the back of the Property and the public sewer (in yellow), adjacent to [REDACTED]. We refer in this decision to the private and public sewers shown on the Plan collectively as the Sewer. The plan also shows a small section of private sewer (in green) which is not the subject of this appeal.

2.5 The map attached at [Appendix 2](#) shows the current sewer system, following the installation of a new sewer (“**the Remedial Sewer**”) in 2016. The Remedial Sewer is shown in green.

C. Chronology of key events

2.6 The Appellant’s home was built in 1937 and at the same time it was connected to the private sewer. The private sewer was built to serve 23 properties.

- 2.7 Around 2000-2001, some properties connected to the private sewer experienced sewer flooding. At that time, the residents did not know the cause of the flooding. It was around four years later that the Appellant discovered Severn Trent had connected a new toilet block at the [REDACTED] pumping station car park (which is used by visitors to the [REDACTED] reservoir and surrounding area) to the private sewer. The [REDACTED] pumping station collected waste from the toilet block and then pumped it down a 63mm diameter 800m long rising main, which then joined a new gravity sewer that connected into the [REDACTED] gravity system, which includes the private sewer.
- 2.8 There is also a pub in the vicinity [REDACTED] which also drains to the Sewer (See Appendix 1). We understand that the pub used to empty cooking fat into the drains which solidified in the Sewer, reducing its diameter and therefore reducing the capacity of the Sewer. The Appellant alleged that although there was a jetting regime in place, Severn Trent did not clean the Sewer with sufficient regularity.
- 2.9 The Appellant stated that around 2002, she suffered ill health as a result of a septic smell that she experienced at the Property, which she attributed to the connection of the toilet block. On the advice of an Environmental Health Inspector, the Appellant installed a stench pipe at her own expense to divert the gases coming into her house from the Sewer.
- 2.10 In 2004, a developer sought planning permission to convert a building belonging to Severn Trent into 34 luxury flats called [REDACTED]. Planning permission was granted for the building, even though the sewage drainage arrangements had not been resolved. At that time, Severn Trent advised the [REDACTED] Planning Board that the private sewer that runs at the back of the 23 houses was in poor condition and did not have the capacity to cope with expected flows from the [REDACTED]. However, later on Severn Trent explained that whilst the available capacity of the private sewer would be greatly reduced, it would still be able to carry the foul flows from the existing properties connected to it. Notwithstanding this, the developers requested to connect [REDACTED] to a proposed new pipe across the village green, but the planning permission for this proposed sewer route was refused following representations made by the residents.
- 2.11 As a result, the developer fell behind schedule but was allowed by Severn Trent to build a holding tank and a pumping station (“**the [REDACTED] Pumping Station**”) which Severn Trent connected to the Sewer, without permission of the

owners of the private sewer. The flow from [REDACTED] ran into an underground storage tank and was then pumped into the Sewer. The transfer pump was activated by a timer and operated at two hourly intervals¹. This system was activated in December 2004, again without permission of the private sewer owners, including the Appellant.

- 2.12 The Appellant stated that around 2005, she experienced severe smells and could not use her garden on warm days, and she was taken to hospital for exposure to hydrogen sulphide gas.
- 2.13 We understand that around the same time Severn Trent fitted a chemical dosing plant at the [REDACTED] Pumping Station to limit the septicity occurring following receipt of its consultant's² report that showed a high level of hydrogen sulphide. Prior to this, the holding tank was being emptied and the contents taken away for disposal on a daily basis.
- 2.14 On 19 September 2011, the Appellant submitted an appeal to Ofwat under section 105B of the Act against Severn Trent's proposal to adopt the private sewer compulsorily.
- 2.15 The Appellant considers that the compulsory transfer of the private sewer would cause her serious detriment because she believes upon the transfer, Severn Trent would remove the holding tanks and directly connect the [REDACTED] properties to the private sewer which would likely cause flooding. Further, the Appellant has stated she plans to carry out an extension to the rear of her Property in the future, and that Severn Trent may not allow this if the private sewer is adopted.

D. Ofwat's investigation

- 2.16 On 22 September 2011, Ofwat received a completed Ofwat appeal form and supporting evidence from the Appellant and on 8 August 2012, the Appellant provided:
- correspondence from the local MP showing that Severn Trent stated the private sewer could not cope with additional capacity;

¹ The Appellant states that when the pump was installed "it was said that it would only empty at night as not to cause disturbance, but yet it is emptied on a timer throughout the day".

² Omex Environmental

- correspondence from Severn Trent which states that the private sewer had no capacity to accept additional flows from new development; and
- correspondence from the developer of [REDACTED] which states they needed to build their own separate drain due to blockages in the Appellant's private sewer.

2.17 Since receiving the appeal, Ofwat has considered the information necessary to make a decision. Where Ofwat needed clarification or additional information from the parties, this was obtained.

2.18 Severn Trent provided inconsistent messages to the residents on whether it considered the sewer to be public or private, and therefore we asked Severn Trent to provide evidence to substantiate its claim that the sewer was a public sewer. On 8 March 2013, we received an email from Severn Trent which stated that it had been unable to find evidence substantiating its assumption that the sewer was a public sewer.

2.19 On 3 July 2013, Ofwat wrote to Severn Trent to clarify:

- why Severn Trent had written to the Appellant to state that it was likely to remove the holding tank and pumping station, in spite of its initial recommendation that the private sewer could not accommodate additional flows;
- whether Severn Trent considered the holding tank and pumping station to be an interim solution in view that the developer proposed alternative routes for a new sewer and whether the local planning department considered the solution as being temporary or permanent;
- whether Severn Trent was aware of what had happened to £150,000 set aside by the developer to pay for the building of the proposed new sewer that was not built; and
- whether Severn Trent knew if any of the £150,000 was kept back by the developer as a contingency to build the planned sewer in future by a different route.

2.20 In its response to Ofwat of 15 July 2013, Severn Trent advised us it would investigate further the above issues surrounding the private sewer and that the investigation would conclude at the end of September 2013.

2.21 Severn Trent provided the results of the investigation through a report ("**the AMEC Report**") on 12 November 2013, which we shared with the Appellant on 21 November 2013. The report stated that the cause and source of the odour

was not fully understood and consequently it proposed a number of potential solutions. Of these, it recommended trialling the following before any capital investment was considered:

- to fully clean the section of sewer from the point of discharge at manhole [REDACTED] down to the sewer at [REDACTED]
- to reduce the distance between start and stop levels in [REDACTED] pumping station wet well to 100mm and to ensure the wet well and rising main are emptied more frequently;
- to install a vented cover (open grate) or vent pipe at manhole [REDACTED];
- to install open ventilation at [REDACTED] pumping station wet well; and
- to read the water meter at [REDACTED] on a fortnightly basis to allow more accurate calculations of seasonal water usage and hence retention times to be made.

3. Legal framework

- 3.1 On 1 July 2011, the Water Industry (Scheme for Adoption of Private Sewers) Regulations 2011 (“**the Regulations**”) came into force, as did the Secretary of State’s scheme for the compulsory adoption of all private sewers, lateral drains and pumping stations in “the area of every sewerage undertaker whose area is wholly or mainly in England” (“**the Scheme**”).
- 3.2 The Regulations and the Scheme give effect to Government policy by placing a duty on sewerage companies to adopt all private sewers, lateral drains and pumping stations (other than those that are expressly exempt). Regulation 3(8) specified 1 October 2011 as the date for the compulsory transfer of all private sewers and lateral drains and 1 October 2016 as the final date for the compulsory transfer of pumping stations.
- 3.3 Regulations 5(1) and 5(2) (Exempt private sewers and exempt private lateral drains) set out that a private sewer is exempt for the purposes of the Scheme if the Sewer:
- a) is owned by a railway undertaker; or
 - b) is situated on or under “Crown land” (as defined in Regulation 5(4)) (and Regulation 5(2)(b) also applies).
- 3.4 The Act provides for an appeal against a company’s compulsory transfer of private sewers, lateral drains and pumping stations. Such an appeal must be lodged under section 105B of the Act which allows an appeal on two grounds, namely:
- a. that the sewerage company is not under a duty to transfer (for example, because a private sewer is on Crown land and is therefore exempt); or
 - b. that the adoption would result in serious detriment to the appellant.

4. Draft decision

4.1 On 27 September 2013 we issued our draft decision.

4.2 Our preliminary conclusion was that Severn Trent's proposal to adopt the private sewer should be allowed and that the private sewer should transfer to Severn Trent. However, under our powers provided by section 105B(9) of the Act, we decided that the transfer of the private sewer should not take effect until there had been compliance with the following two conditions:

- a) that Severn Trent identifies and implements a solution which resolves the odour and blockages, and does not increase the risk of sewer flooding at the properties at [REDACTED] and
- b) that Severn Trent pays £900 in compensation to the Appellant in retrospective payment for the number of years that the problem has remained unsolved, and £75 per month from 2014 until the solution is fully implemented. The draft decision said that while Ofwat considers it cannot direct Severn Trent to implement a particular solution within a specified time frame, it recognises the seriousness of the problems caused by Severn Trent in this case and considers that a monthly payment to the Appellant will act as an incentive for Severn Trent to put the necessary solution in place. Ofwat considered that a monthly payment needed to be made to the Appellant after 2014 to signal the urgency required for implementing an effective solution.

4.3 We calculated the compensation based on the minimum Guaranteed Standards Scheme (GSS) payment³ (£75) that Severn Trent would have had to pay for an incident of external sewer flooding at the property. We backdated the payment from the year in which the incident was first reported (2001) and took into account the number of years which had passed (12 years) during which the problem was not rectified by Severn Trent.

³ http://www.ofwat.gov.uk/consumerissues/rightsresponsibilities/standards/gud_pro_gss08.pdf

Comments on the draft decision

Severn Trent's response

4.4 On 18 October 2013, Severn Trent responded to our draft decision. Its representations are summarised below.

- It stated that it was investigating the issues at [REDACTED] and was hoping to have a report⁴ of the findings by the end of October 2013. It proposed to continue with the chemical dosing and cleansing of the Sewer, which it considered had been effective.
- It agreed to proceed “as if the sewer is the property of [Severn Trent] and investigate the best solution to the issues in the area...”. However, it did “not consider that there is an obligation to pay compensation as this sewer would not have transferred to Severn Trent until at the earliest 1 October 2011 and [it] would have had no liability nor responsibility for it prior to that date”. Severn Trent also said that its records showed “no reported sewer flooding incidents nor GSS payments, relating to [REDACTED] since 2011” and that “in relation to this [private sewer transfer] appeal, as a gesture of goodwill [it is] prepared to pay 2 x £75 for the years since transfer”.
- It stated that with regard to the payment of £75 per month from 2014, it did not consider that there should be a penalty imposed on Severn Trent in relation to a sewer which had not previously been its responsibility. It added that “there doesn't need to be an incentive to take action. The operational solution is currently effective, which means that no capital solution will be required. Severn Trent will of course continue to monitor the situation”.

The Appellant's response

4.5 The Appellant provided her representations on 16 October 2013. In her response, the Appellant raised most of the points which she had raised as part

⁴ The AMEC Report

of her appeal and which we consider we have already addressed. Therefore, we do not reproduce these below.

4.6 Additionally, the Appellant made the following points:

- given Severn Trent's unlawful connection to the private sewer, she did not trust Severn Trent to stick to the rules in the future. She expressed the view that Severn Trent considers that as the statutory undertaker it can do what it likes;
- that the only condition which Ofwat should make as part of its decision was for a new sewer to be constructed as had been originally intended and for Severn Trent remove the connection of upstream properties from the Appellant's private sewer so that the private sewer could go back to serving the 23 houses which it had originally been built to serve; and
- that residents should not be put in a position to find out whether in the future Severn Trent will or will not do things correctly.

4.7 The Appellant also added that the compensation amount Ofwat suggested was "an extremely insulting offer for all the years that [Severn Trent] has been allowed to get away with this but also not fair to residents that have also been affected who haven't been able to appeal have suffered the same because they live in a Council house and didn't get the option".

4.8 The Appellant further provided some factual corrections to the draft decision and we have reflected those changes in paragraphs 2.6, 2.8, 2.9, 2.10, 2.11, and 2.19 of this decision.

5. Further issues

- 5.1 Given that both parties did not accept the conditions attached to the draft decision, and because of the longstanding issues which had been brought to light by the Appellant as part of her appeal, we decided to put the appeal on hold while we investigated (using our powers under the Section 94 of the Act) the issues around the sewer system in and around [REDACTED].
- 5.2 In December 2015, Severn Trent provided us with a commitment that it would install the Remedial Sewer upstream of the residents' private sewer. We therefore agreed to suspend our investigation into Severn Trent until that work was complete.
- 5.3 In January 2016, Severn Trent started the necessary work to install the Remedial Sewer. As part of this work, flows coming down from [REDACTED] and [REDACTED] pumping stations were diverted into the Remedial Sewer. Flows from the [REDACTED] were also diverted into the Remedial Sewer (see Appendix 2) and a fat interception unit was installed with the agreement of the pub owner. The [REDACTED] pumping station was abandoned and manholes⁵ along the private sewer line were sealed to provide additional protection against any future concerns. Severn Trent also removed sections of the redundant sewer and manholes to address the Appellant's concerns associated with future connections upstream. The work was completed in early November 2016.
- 5.4 We consider the Remedial Sewer resolves the problems which the Appellant had raised through her appeal, as upstream properties no longer drain through the private sewer. In view of this, we emailed the Appellant to ask whether she still wanted to pursue her appeal. On 15 November 2016, the Appellant confirmed that she does not want "a company [she] feels is incompetent of doing anything correctly and not only deceives its customers but lies to them too, to have ownership of the drain".

⁵ Existing manholes MH [REDACTED] and MH [REDACTED] and new manholes [REDACTED] and [REDACTED].

6. Final decision

The private sewer

- 6.1 Section 219 of the Act sets out statutory definitions of the terms ‘drain’, ‘lateral drain’ and ‘sewer’ which are applicable to the Regulations and the Scheme. In terms of those definitions, the Sewer currently comprises of a private sewer and a public sewer as set out in section 2.4 above.
- 6.2 We are satisfied that neither paragraph 3.3 (a) nor paragraph 3.3 (b) above applies in relation to the private sewer and that therefore:
- a) the private sewer is not exempt from the Scheme; and
 - b) Severn Trent has a duty under the Regulations and the Scheme to adopt the private sewer.

Serious detriment (section 105B(3)(a) of the Act)

- 6.3 The Appellant considers that the transfer of the private sewer would be seriously detrimental to her for the reason set out in section 2.15 above.
- 6.4 We consider that to establish serious detriment **there has to be an actual effect, meaning an effect must be in place at the time of any transfer**, and not merely a future possibility. The Appellant stated that plans to extend the rear of her property had been “drawn and planning permission was passed for an extension at the rear of [her] property around 2004” and that “therefore [she] was allowed to build over the drain”. This does not, however, mean that she has an automatic right to build over the sewer. There has to be build-over agreement between a water company and anyone planning to build over a sewer, and any planning permission which had been obtained around 2004 would have expired by about 2011, at the time the Appellant submitted her appeal. Therefore, we do not consider that the Appellant has been able to establish serious detriment on this basis.
- 6.5 At the time she submitted her appeal, the Appellant was concerned that if the private sewer was transferred Severn Trent could connect the [REDACTED] [REDACTED] directly to it. With the Remedial Sewer in place, we consider that there is no future possibility of this occurring given that Severn Trent has already

decommissioned the pumping stations and connected the drainage of upstream properties into the Remedial Sewer.

- 6.6 Further, we consider that a transfer to Severn Trent would relieve the Appellant of any future maintenance liability for the private sewer. If the private sewer were to transfer, Severn Trent will have a duty under section 94 of the Act to maintain the sewer, which is enforceable by Ofwat. Given the odour and sewer flooding problems with this sewer, we consider that it is appropriate that ownership and responsibility for maintaining the sewer should transfer to Severn Trent. Therefore, we determine that the private sewer should transfer to Severn Trent effective from the date after this determination is issued.

European Convention of Human Rights

- 6.7 We have also considered the Appellant's appeal by reference to the Appellant's rights under the European Convention on Human Rights, notably Article 1 of the First Protocol to the Convention which provides:

(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

- 6.8 We have concluded that a payment of compensation to the Appellant would not be needed on the transfer of the private sewer to Severn Trent in order to ensure a fair balance between the Appellant's interests and the public interest in a more integrated sewerage system⁶. Furthermore, we do not consider that the Appellant would suffer serious detriment if compensation were not paid to the Appellant on a transfer of the private sewer to Severn Trent. In making this decision we have had regard to other private sewer appeals we have

⁶ See R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295

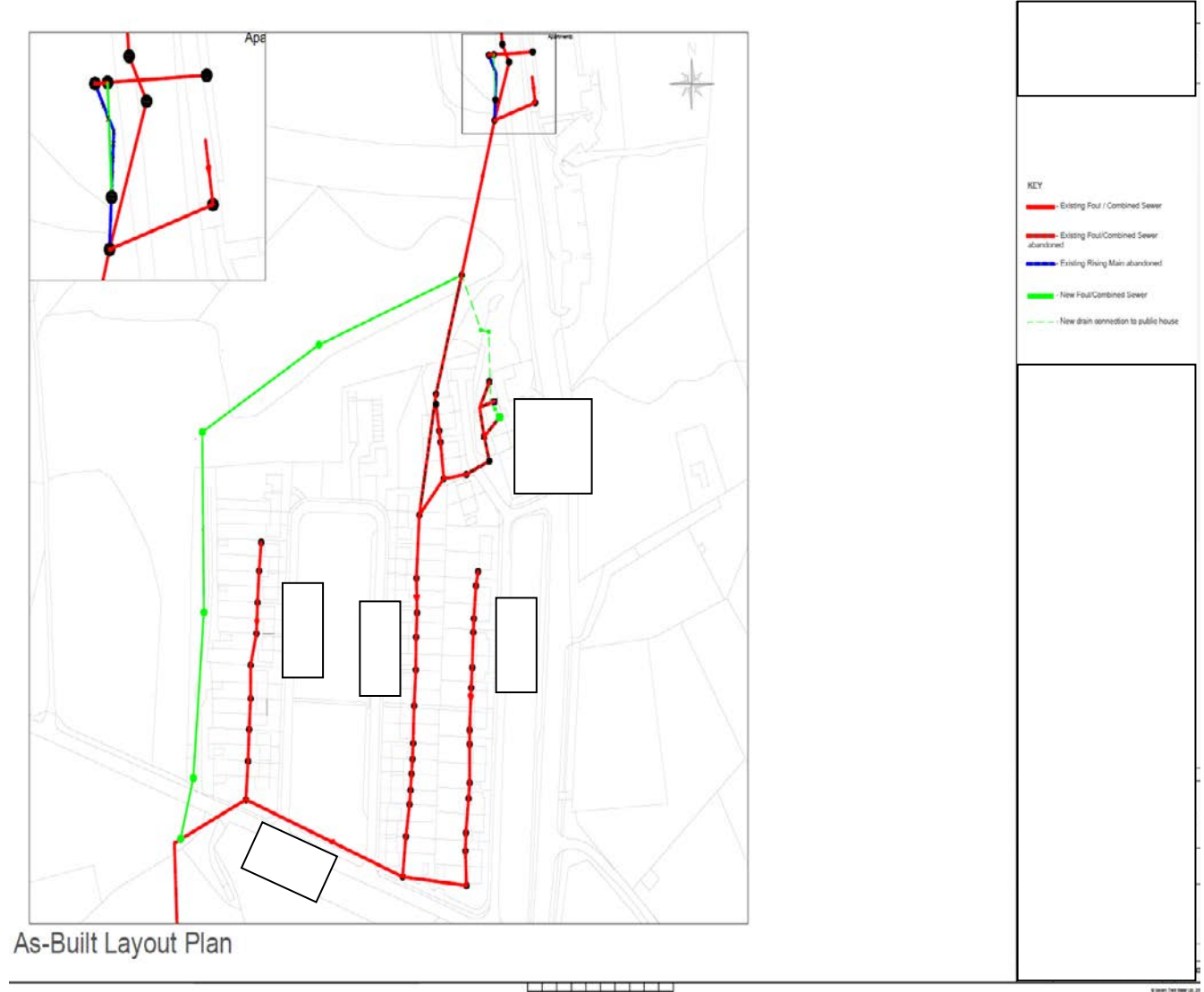
considered and we have had regard to the fact that Severn Trent will take over responsibility for maintaining the private sewer.

- 6.9 We therefore conclude that Severn Trent's proposal to adopt the private sewer should be allowed and that the private sewer (marked in light blue on the map at Appendix 1) should transfer to Severn Trent.

7. Appendices

Appendix 1: Map of [REDACTED] sewer system

Appendix 2: The Remedial Sewer



Appendix 3: Some of the definitions set out in section 219(1) of the Act and subsection (2) of section 219 of the Act.

“drain” means (subject to subsection (2) below) a drain used for the drainage of one building or of any buildings or yards appurtenant to buildings within the same curtilage;

“lateral drain” means—

(a) that part of a drain which runs from the curtilage of a building (or buildings or yards within the same curtilage) to the sewer with which the drain communicates or is to communicate; or

(b) (if different and the context so requires) the part of a drain identified in a declaration of vesting made under section 102 above or in an agreement made under section 104 above;

“sewer” includes (without prejudice to subsection (2) below) all sewers and drains (not being drains within the meaning given by this subsection) which are used for the drainage of buildings and yards appurtenant to buildings;

Subsection (2) of section 219 of the Act:

(2) In this Act—

(a) references to a pipe, including references to a main, a drain or a sewer, shall include references to a tunnel or conduit which serves or is to serve as the pipe in question and to any accessories for the pipe; and

(b) references to any sewage disposal works shall include references to the machinery and equipment of those works and any necessary pumping stations and outfall pipes;

and, accordingly, references to the laying of a pipe shall include references to the construction of such a tunnel or conduit, to the construction or installation of any such accessories and to the making of a connection between one pipe and another.